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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-1511

CECIL ARCHER,
Petitioner,

vs.

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The petitioner, Cecil Archer, by and through his counsel, respectfully prays that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Ninth Circuit affirming the order of summary judgment granted by the United States District Court for the Northern District of California.

OPINION BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit (*Archer v. Airline Pilots Association, International,* 609 F.2d 934 (9th Cir. 1979), numbered 76-2520), affirming the summary judgment order granted by the United States District Court for the Northern District of California, is set forth in Appendix "A" attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit set forth in Appendix "A" hereto, was entered on November 7, 1979. On November 21, 1979, petitioner timely filed a petition for rehearing *en banc* with the Ninth Circuit. On January 4, 1980, that Court denied the petition for rehearing and rejected the suggestion for a rehearing *en banc*. (A copy of that order is set forth in Appendix "B" attached hereto.)

Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

Does a union designated as the exclusive bargaining agent under the Railway Labor Act owe its members a duty of fair representation to oversee the administration and enforcement of insurance benefits once the union has: (1) negotiated those particular benefits with the employer; (2) incorporated these benefits into the collective bargaining agreement booklet; and (3) provided a grievance procedure to resolve any action of the employer which adversely affects the individual employee?

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved herein is the Railway Labor Act (45 U.S.C. §§ 151 *et seq*). Section 151(a) of the RLA provides in relevant part as follows:

> The purposes of the chapter are: . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 152 of the RLA provides in relevant part:

> . . . It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 181 of the RLA provides in pertinent part:

> All of the provisions of sections 151 to 152 . . . of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce . . .

45 U.S.C. § 182 of the RLA provides in full:

> The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151 to 152 and 154 to 163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 151 of this title.

STATEMENT OF THE CASE

A. Course of Proceedings Now Before This Court

Petitioner, now a disabled and retired airline pilot of Braniff Airways, Inc., filed an action in the United States District Court for the Northern District of California in 1975 under the Railway Labor Act alleging that Air Line

Pilots Association, International (hereinafter "ALPA"), the union designated as the exclusive bargaining agent for Braniff Pilots, breached its duty of fair representation by investigating and processing petitioner's insurance grievances with Braniff and its insurer, Connecticut General, in an arbitrary, discriminatory, and/or bad faith manner. The complaint further alleged that as a result of ALPA's failure to fairly represent petitioner's insurance grievances, petitioner incurred damages (attorney's fees and court costs) when he retained private counsel to process his insurance grievances against Braniff and Connecticut General [CT 1-7].

In February of 1976, ALPA filed a motion for summary judgment on the following grounds: (1) that petitioner's action was barred by the statute of limitations; and (2) that petitioner failed to state a legally valid claim in that ALPA owed no legal duty of fair representation to process petitioner's insurance grievances and that even if it did, that duty was not breached by ALPA's conduct [CT 73-107].

On June 1, 1976, the district court judge summarily granted ALPA's motion for summary judgment. Petitioner timely filed a notice of appeal to the Ninth Circuit on June 28, 1976, claiming that the district court judge erred in granting ALPA's motion for summary judgment on each of the grounds raised by ALPA.

On November 7, 1979, the Ninth Circuit, in a published opinion (609 F.2d 934), affirmed the district court's order granting summary judgment in favor of respondent on the ground that ALPA did not owe any legal duty of fair

representation to Petitioner with respect to his insurance grievances.[1]

On November 21, 1979, petitioner timely filed a petition for rehearing *en banc* with the United States Court of Appeals for the Ninth Circuit. However the Ninth Circuit denied that petition on January 4, 1980 (See Appendix "B", attached hereto), and accordingly, petitioner now seeks succor from this court via a writ of certiorari.

B. Material Facts Concerning the Union's Duty of Fair Representation vis-a-vis Petitioner's Insurance Grievances.

Pursuant to § 2, Fourth Article of the Railway Labor Act, ALPA was and is now the union designated as the exclusive collective bargaining representative for the flight deck operating crew members employed by Braniff. As such, on March 13, 1969, ALPA and Braniff entered into a collective bargaining agreement providing for, *inter alia*, rates of compensation, hours of work, general working conditions, and a proeedure for the orderly settlement of any disputes. In addition, ALPA negotiated with Braniff for various forms of insurance coverage which Braniff agreed to provide to its pilots. This negotiation for the insurance coverage culminated in a letter of agreement, dated March 13, 1969, which was incorporated into and

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[1]Insofar as the other grounds urged by ALPA in support of its motion for summary judgment, the Ninth Circuit found that petitioner's complaint was *not* barred by the statute of limitations with respect to his contingent fee reimbursement claim. Needless to say, since the Ninth Circuit found that ALPA owed no legal duty of fair representation to petitioner vis-a-vis his insurance grievances, the court did not discuss whether ALPA's conduct in investigating and processing petitioner's insurance claim violated the union's purported duty of fair representation.

made part of the March 13th collective bargaining agreement booklet. (See Appendix "C" attached hereto, for the complete text of that agreement.)

In accordance with the terms of the collective bargaining agreement, Braniff secured a certificate of insurance from a carrier, Connecticut General, certifying the issuance of various policies for the benefit of its pilot employees. In April of 1969, Braniff made available to its pilot employees several group policies, two of which are germane to this action: a basic life insurance policy with an optional supplemental coverage, and an optional long term disability plan (hereinafter "LTD"). Under the terms of the basic life insurance policy all Braniff pilots were entitled to $10,000.00—the benefits of which were payable upon the death or total disability of the pilot. Braniff pilots were entitled to expand their basic life insurance coverage by electing supplemental life insurance coverage up to $40,000.00. Braniff pilots were also given an optional plan involving LTD benefits of $1,500.00 per month, less certain deductions, which were payable to an eligible pilot commencing 180 days after the pilot became totally and permanently disabled or until reaching the age of 65 [CT 211-249].

On March 30, 1969, petitioner, a pilot employed by Braniff for the last twenty-six years, elected to enroll in the supplemental life insurance policy in an amount up to $40,000.00. On April 3, 1969, petitioner also enrolled in the optional LTD plan. On April 20, 1969, petitioner was hos-

pitalized for leg pains and subsequently became permanently disabled.[2]

Following his disability, petitioner filed a claim with Braniff for the following insurance benefits: (1) the $10,000.00 basic life insurance coverage; (2) the supplemental life coverage up to $40,000.00; and (3) the $1,500.00 per month LTD coverage. Braniff's insurer, Connecticut General, paid the $10,000.00 basic amount in March of 1970 but declined to pay either the LTD or the supplemental life insurance benefits.

Consequently, in March of 1970, petitioner turned to his union for help. Captain Archer requested ALPA to fairly represent him in investigating and processing his insurance claims against Braniff and Connecticut General. ALPA, after promising petitioner it would help him, failed to do anything but shuffle Captain Archer's documents for a two-year period.[3]

Neither Captain Archer nor ALPA were certain whether his claim could be processed through the Section 37 griev-

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[2]On April 28, 1969, petitioner underwent serious and lifesaving surgery for ischemic myocardiopathy with myocardial irritability and severe aortoiliac femoral occlusive disease (hardening of the arteries). Because of Captain Archer's condition, the Federal Aviation Administration would not renew his license [CT 323-324]. Although Captain Archer appealed this decision, he was turned down in January of 1970, compelling his early retirement effective August 1, 1969. Said condition has necessitated the use of an artificial leg, and has confined Captain Archer to a wheelchair since that time.

[3]Since the only issue before this court is whether the Court of Appeals erred in holding that ALPA did not owe Captain Archer any duty of fair representation, petitioner need not present the overwhelming documentary evidence of the inept, inadequate, and perfunctory handling of his insurance grievances by the union which petitioner claims established a clear breach of the union's duty of fair representation.

ance machinery, or through some independent mechanism.[4] However, by the time ALPA had informed Captain Archer that it was unwilling to pursue his case, the 60-day limitation period for initiating the grievance procedure had long passed [CT 203].

After having endured hollow promises from ALPA, Captain Archer retained a private attorney in May of 1972 and sued Braniff and Connecticut General for $77,283.63, the amount of insurance monies to which he was entitled under the supplemental life insurance and LTD benefits. Prior to trial, Braniff and Connecticut General settled the case on April 15, 1975, for the full amount of benefits that Captain Archer had sought in the lawsuit. However, Captain Archer was required to pay his attorney a contingency fee of $30,913.45.

In June of 1975, Archer initiated litigation in the United States District Court for the Northern District of California against ALPA under the RLA, claiming that he

[4]Section 37 provides:

Any pilot, or group of pilots, in the service of the Company who have a grievance concerning *any action of the Company affecting* them shall be entitled to the same right of investigation, hearing and appeal as is established in Section 36 hereof for the investigation and hearing of cases of discipline and dismissal.

Such grievance shall specify the provision or the provisions of the contract which the Company is alleged to have violated and shall state the date and the place when such alleged violation supposedly occurred. Except for cases involving the disciplining or dismissal of an employee, to be effective the grievance must be filed within sixty (60) days after the pilot, or group of pilots, reasonably would have knowledge of the action complained of. The parties may mutually agree to extend such sixty (60) day limitation where the circumstances warrant. The written request for investigation and hearing as provided in Section 36, Paragraph A-3, of this Agreement shall be addressed to the Vice President Flight Operations, with a copy thereof to the pilot's immediate supervisor. (Emphasis added.)

would not have incurred the above-listed attorney's fee had ALPA fairly represented him after Braniff and Connecticut General refused to pay his insurance claims.[5]

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Opinion Below Is in Conflict With Several Decisions of This Court and Other Circuit Courts.

This court just recently reaffirmed the principle that a union designated as the exclusive bargaining agent under the RLA "must represent fairly the interests of all bargaining-unit members during the negotiation, *administration* and *enforcement* of collective bargaining agreements" (emphasis added). *International Brotherhood of Electrical Workers v. Foust* (1979) ..... U.S. ..... [99 S.Ct. 2121, ... L.Ed.2d .....]. See also *Conley v. Gibson* (1957) 355 U.S. 41, 46 [78 S.Ct. 363, 11 L.Ed.2d 3701; *Hines v. Anchor Motor Freight, Inc.* (1976) 424 U.S. 554, 564 [96 S.Ct. 1048, 47 L.Ed.2d 231].

In holding that ALPA did not owe petitioner any duty of fair representation with respect to his insurance dispute with Braniff even though the union negotiated the insurance benefits, the Ninth Circuit completely ignored a well-settled principle of federal labor law: namely, that once the exclusive bargaining agent negotiates a particular benefit, the duty of fair representation attaches to compel the administration and enforcement of that which was negotiated. *Conley v. Gibson, supra,* 355 U.S. 41; *Woody*

[5]Litigation against the union was not commenced earlier because Captain Archer was not damaged until he prevailed in his suit against Braniff and Connecticut General and became obligated to pay his attorney's contingency fee [CT 287].

v. Sterling Aluminum Products, 243 F.Supp. 755, 766 (E.D. Mo. 1965), aff'd 365 F.2d 448 (8th Cir. 1966).

In the instant case, ALPA was the exclusive collective bargaining agent for Braniff pilots such as Archer under the RLA. As such, it negotiated the applicable collective bargaining agreement and letters of agreement which governed *inter alia* rates of compensation, hours of work, general working conditions, various forms of insurance coverage, and a procedure for the orderly resolution of any disputes. While ALPA arguably may not have been bound contractually to negotiate such insurance packages, it undeniably undertook to provide such benefits in the 1969 bargaining sessions. No individual pilot could have bargained for these benefits on his or her own. Were the union's duty to cease after the signing of the agreement as implicit in the Ninth Circuit's opinion below, any gains derived from the collective bargaining process would become ephemeral.[6]

Such a result was reached in *Nedd v. United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977) *cert. den.* 434

[6]Indeed, the union's legal counsel at the time Archer solicited the union's help admitted that ALPA had a responsibility under the BRANIFF-ALPA contract to ensure that the insurance benefits be honored:

> Q. Did ALPA have a function to police the negotiated agreement that you just looked at?
>
> A. ALPA had a responsibility to make sure that BRANIFF provided to the BRANIFF pilots what the letter of agreement called for.
>
> Q. And if BRANIFF did not provide that coverage, then there would be a violation breach of this agreement; is that correct?
>
> A. If there was a question as to whether or not BRANIFF had or had not provided the proper coverage, then the pilot involved had a right, under the contract, to file a grievance which ALPA *would have an obligation to allow that pilot the mechanism through which to test, if you might, the grievance procedure, or test the viability of the pilot's claim* [BERK DEPO. 56:9-22; emphasis added].

This explains, no doubt, why ALPA established a Research and Retirement Office within its own organization to investigate and process insurance disputes arising from the contractual benefits it negotiated in 1969.

U.S. 1013. There, the court considered the right of pensioned coal miners to obtain relief in federal court for the failure of their pension fund trustees and their union to enforce coal mine operators' contractual obligations to pay a royalty to the health and welfare fund. The Court of Appeals affirmed the trial court finding that there was no *contractual* obligation on the part of the union to enforce the operators' promise to pay royalties to the fund; however, the Third Circuit found that once the union elected to undertake the task of bargaining for and enforcing future retiree benefits, the duty of fair representation applies. The Court then concluded that since the National Labor Relations Act conferred the status of exclusive bargaining agent upon the union, the complaint against the union properly alleged a breach of the duty of fair representation. *Id. at* 200.

Nor should the presence of Connecticut General in the original litigation denigrate the union's responsibility to fairly protect Captain Archer's rights under the ALPA-Braniff contract. As in *Nedd v. United Mine Workers of America, supra,* the necessity of joining third-party trustees did not absolve the union of responsibility for its wrongful conduct. Had the union invoked the grievance procedure set forth in Section 37 of the collective bargaining agreement, as appellant had requested as early as April, 1976, the subsequent litigation against Braniff and Connecticut General might have been obviated.

B. The Ninth Circuit's Opinion Discourages Administrative Resolution of Petitioner's Dispute and Thus Repudiates Federal Labor Policy.

The purposes of the RLA, set out in 45 U.S.C. § 151(a), include the prompt and orderly settlement of all disputes concerning rates of pay, rules of working conditions, as well as all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions.

In the instant case, Captain Archer—a longtime union member—followed all internal procedures in obtaining union assistance. His requests followed the chain-of-command from local chairman to district committee, to national (insurance department) officer. ALPA, however, failed to evoke the grievance machinery provided under Section 37 of the collective bargaining agreement—encouraging Captain Archer to do so on his own if he so desired. Unfortunately, this "advice" was not conveyed to Captain Archer until the 60-day limitation period had long passed. Thus the only recourse was to initiate litigation.

If union members are to be discouraged from relying upon their associates to the extent that they have contractual or statutory remedies of their own, Congress' special concern to avoid disruption of commerce in the transportation industry (45 U.S.C. § 151(a)) is likely to be thwarted. Resort to administrative remedies will be avoided, and "minor"—i.e., individual—disputes will less likely be handled efficiently and quickly. The danger that commerce will be disrupted in sympathy with individual grievances will remain as threatening as if the Act had never been passed. See *Union Pacific Railroad Co. v. Price* (1959) 360 U.S. 601, 609 [79 S.Ct. 1351, 3 L.Ed. 2d 1460].

CONCLUSION

Petitioner herein requests only to hold the union responsible for enforcing the terms of a collective bargaining agreement it negotiated as petitioner's exclusive bargaining representative. Since ALPA has undertaken the task of providing these benefits, federal statutory law, and federal common law implied from statutory authority conferred upon collective bargaining representatives suggest the need to protect individual recipients of these benefits. Any other result would permit discriminatory, arbitrary or bad faith handling, administration and enforcement of the provisions of a collective bargaining agreement.[7]

It has been over ten years since appellant suffered the permanent disability which caused his premature retirement as an airline pilot. He has yet to receive the insurance protection negotiated for him under the then existing collective bargaining agreement. For the foregoing reasons, it is respectfully requested that this Honorable Court issue a Writ of Certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit.

Dated: March 21, 1980

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(Appendices follow)

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[7]Indeed, the Ninth Circuit Opinion would apparently permit ALPA to allow Braniff to expressly exclude Archer from coverage for whatever reason.

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 76-2520

Cecil L. Archer,
Plaintiff-Appellant,

vs.

Airline Pilots Association
International,
Defendant-Appellee.

[Filed Nov. 7, 1979]

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: TRASK and HUG, Circuit Judges, and WONG,* District Judge

PER CURIAM:

Plaintiff-Appellant Cecil L. Archer, a disabled pilot, sued his union, defendant-appellee Air Line Pilots Association International (ALPA), under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, for allegedly breaching its duty of fair

*Honorable Dick Yin Wong, United States District Judge, for the District of Hawaii, sitting by designation. Judge Wong died on December 26, 1978. Judge Wong heard oral argument and voted in accordance with the judgment herein, but did not approve the Opinion of the court.

representation by failing to process properly Archer's insurance grievance. The district court granted summary judgment in ALPA's favor. We affirm.

On March 13, 1969, Braniff Airways, Inc., Archer's employer, and ALPA signed a Letter of Agreement which provided that Braniff would make available to its pilots specified amounts of group insurance coverage. Pursuant to this agreement, Braniff secured several group policies from Connecticut General Life Insurance Company. Braniff paid the premium for the basic life insurance policy, under the terms of which $10,000 was payable upon the death or disability of a pilot. In addition to the basic coverage, pilots were given the option of obtaining supplemental life and disability insurance at their own expense. Archer alleges that he filed timely applications for a $40,000 supplemental life insurance policy and a $1,500 per month disability insurance policy. On April 20, 1969, Archer was hospitalized; he subsequently became totally disabled and retired from Braniff's service. He filed a claim for the $10,000 basic coverage, the $40,000 supplemental coverage, and the $1,500 per month disability benefits. Connecticut General refused to pay more than $10,000, contending that the supplemental life insurance policy's face amount was payable only in the event of the pilot's death, not his disability, and that Archer was ineligible for disability benefits because he had not submitted his enrollment form on time.

Instead of filing a grievance against Braniff, whose duty it was to ensure that pilots received the coverage promised them by the March 13, 1969 Letter of Agreement, Archer complained to ALPA. The union investigated Archer's com-

plaint, and on July 30, 1971, it informed him that no action would be taken. ALPA advised Archer that two potential avenues for seeking redress were open to him: filing a grievance against Branift and suing Connecticut General. Despite this formal rejection of his request for assistance, Archer continued to press the union to "handle his grievance." A union official made certain enquiries on Archer's behalf, but by March 1972 it was clear that ALPA considered Archer's case closed.

On May 16, 1972, Archer entered into a contingent fee arrangement with a private attorney, paid him a $500 retainer, and authorized him to sue Braniff and Connecticut General. Such a suit was filed in the United States district court on March 28, 1973. On April 15, 1975, the defendants settled the case by paying Archer the full amount of the benefits he had requested ($77,283.63). Pursuant to the contingent fee contract, Archer paid his attorney $30,913.45. He also incurred court costs of $92.

On June 16, 1975, Archer filed the instant action against ALPA. He charges the union with having "breached its duty of fair representation by handling the plaintiff's insurance grievances with BRANIFF, and its insurer in an arbitrary, discriminatory, and bad faith manner" as a result of which "plaintiff incurred damages (attorney's fees and court costs) when he retained a private attorney to process his insurance grievances against his employer, BRANIFF, and its insurer." An amended complaint was filed on October 25, 1975. ALPA moved for summary judgment on the grounds that: (1) Archer's action was barred by the statute of limitations; and (2) Archer failed to state a valid claim. In support of the second ground, ALPA

argued that it was under no legal obligation to handle Archer's insurance grievance, and claimed that even if such a duty was owed, there existed no genuine issue as to any material fact pertaining to the adequacy of its performance of that duty. Without stating the ground on which it relied, the district court granted summary judgment in ALPA's favor. Archer then took this appeal.

I

We address ourselves first to the statute of limitations question. Archer is a resident of California; all of the relevant events occurred in California; and California is the forum state. Therefore, the applicable statute of limitations is Cal.Civ.Pro.Code § 338, which requires that "an action upon a liability created by statute, other than a penalty or forfeiture" be commenced within three years. *Price v. Southern Pacific Trans. Co.,* 586 F.2d 750, 752-53 (9th Cir. 1978). Although state law defines the length of the limitations period, federal law determines when the plaintiff's alleged cause of action accrued. *Id.* at 754. To identify the time of accrual, courts look to (1) the date on which the last "action by the Union of any consequence occurred"; and (2) "the point at which t'.e injury to [the union member] allegedly caused by the Union became fixed and reasonably certain." *Id.*

ALPA's last official act occurred in July 1971 and its last unofficial act in March 1972. Interpreting the facts in the light most favorable to Archer, we consider the latter the final action "of any consequence." On May 16, 1972, only a few weeks after the union closed its files on Archer's insurance complaint, he suffered a "fixed and reasonably

certain" injury in the amount of $500, the sum he paid to his attorney. At that time, it also became apparent that he would suffer further monetary injuries in the form of court costs. The general rule is that, where it is possible to prove the extent of future injuries without resorting to undue speculation, the cause of action for those injuries is deemed to have accrued when the wrongful act occurred. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 339 (1971). Thus, Archer's cause of action against ALPA for reimbursement of the $500 retainer and the $92 in court costs accrued in March 1972. Because Archer did not file suit against ALPA until June 16, 1975, more than four years after the accrual date, the retainer and court costs claims were time-barred.

Archer's contingent fee reimbursement claim was not time-barred, however. Where future damages are too speculative to prove at the time the defendant's wrongdoing takes place, "the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered." *Id.* at 339. Under this rule, "an accrual of damages can constitute the accrual of a cause of action even though all wrongful acts took place outside the limitations period." *In Re Multidistrict Vehicle Air Pollution,* 591 F.2d 68, 72 (9th Cir. 1979). But the plaintiff's recovery is restricted to damages that accrued during the applicable limitations period. *See Hanson v. Shell Oil Co.,* 541 F.2d 1353, 1361 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977). The contingent fee contract provided that Archer's attorney would receive a percentage of any sums received from Connecticut General and Braniff. Until settlement was reached on April 15, 1975, it was impossible to esti-

mate the amount Archer would eventually owe his counsel; the size of the fee could have ranged anywhere from zero to tens of thousands of dollars. Had Archer sued ALPA for reimbursement of the contingent fee at any time prior to April 15, 1975, his suit undoubtedly would have been dismissed on the ground that the damages sought were unduly speculative. Given these circumstances, Archer's cause of action for reimbursement of the contingent portion of his attorney's fee accrued on the date when the fee became "fixed and reasonably certain," April 15, 1975, which was only two months before the instant suit was filed.

We hold that the three-year statute of limitations furnished an adequate basis for granting summary judgment in ALPA's favor only as to Archer's cause of action for recovery of the retainer and court costs. The statute did not justify summary judgment on the contingent fee reimbursement claim.

II

Now we must ask whether the other ground asserted by ALPA—failure to state a claim—warranted summary judgment against Archer on the contingent fee reimbursement issue. To state a good cause of action, Archer had to allege that ALPA owed him a duty to process his grievance in accordance with the standards of fair representation doctrine, that ALPA breached that duty, and that as a consequence he had to pay the contingent fee. If the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits showed that ALPA owed no duty of fair representation under these circumstances,

ALPA was entitled to judgment as a matter of law regardless of the nature of its conduct.

In the recent case of *International Brotherhood of Workers v. Foust,* 99 S.Ct. 2121, 2125 (1979), the Supreme Court described a labor union's duty of fair representation in these terms:

> This Court first recognized the statutory duty of fair representation in *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192 (1944), a case arising under the Railway Labor Act. *Steele* held that when Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, and thereby subordinated individual interests to the interests of the unit as a whole, it imposed on unions a correlative duty "inseparable from the power of representation" to exercise that authority fairly. *Id.* at 202-204; *see Humphrey v. Moore,* 375 U.S. 335, 342 (1964); *Vaca v. Sipes,* 386 U.S. 171, 182 (1967); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 564 (1976). The fair representation doctrine thus serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes, supra,* 386 U.S. at 182. Under the doctrine, a union must represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective-bargaining agreements. *See, e.g., Conley v. Gibson,* 355 U.S. 41, 46 (1957); *Humphrey v. Moore, supra,* 375 U.S. at 342; *Hines v. Anchor Motor Freight, Inc., supra,* 424 U.S. at 563-567. In particular, a union breaches its duty when its conduct is "arbitrary, discriminatory or in bad faith," as, for example, when it "arbitrarily ignore[s] a meritorious grievance or process[es] it in a perfunctory fashion." (Footnote omitted).

See also Ness v. Safeway Stores, Inc., 598 F.2d 558 (9th Cir. 1979); *Franklin v. Southern Pacific Trans. Co.*, 593 F.2d 899 (9th Cir. 1979); *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082 (9th Cir. 1978); *Dente v. International Org. of Masters, Mates and Pilots, Local 90*, 492 F.2d 10 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

Archer's argument founders because ALPA did not owe him a duty of fair representation. As *Foust* makes clear, the statutory duty of fair representation arises when by statute the union is the employees' exclusive bargaining agent with the employer. 99 S.Ct. at 2125. The doctrine protects arbitrary union conduct against employees when the union provides the employees' only redress against the employer. *Id.*

Archer's grievance against Connecticut General is a different matter. ALPA was not statutorily empowered to provide redress for Archer's grievance against Connecticut General. Nor did the ALPA-Braniff collective bargaining agreement provide that ALPA would be the employees' exclusive bargaining agent with Connecticut General. The bargaining agreement required Braniff to obtain insurance for its employees, but it neither set up procedures for making insurance claims nor made ALPA the exclusive vehicle for pursuing grievances. Archer was not required, under the terms of the agreement, to first exhaust procedures provided in the agreement before resorting to the courts. Indeed, he brought suit directly in the district court and has cited other cases where other pilots, union members of ALPA, brought suit. *Myre v. Connecticut General Life Insurance Co.*, 501 F.2d 609 (8th Cir. 1974); *Moore v.*

Connecticut General Life Insurance Co., 277 So.2d 839 (Fla. App. 1973), *cert. denied*, 291 So.2d 204 (Fla. 1974). It is clear that ALPA had no duty to fairly represent Archer's grievance against Connecticut General.

Archer contends however, that "assuming *arguendo* that ALPA owed no legal duty of fair representation to ARCHER vis-a-vis his insurance claims, it, nonetheless, became subject to this fiduciary duty once it made representations, upon which appellant relied, that it would investigate his claim." This estoppel argument is without merit. Even if Archer did rely upon ALPA to process his grievance, his reliance was unreasonable. Having served as one of ALPA's representatives during negotiation of the collective bargaining agreement with Braniff, Archer knew or should have known that he had no right to expect ALPA to handle his case in a particular manner until he had filed a grievance in accordance with section 37 of the contract.

In conclusion, we hold that, with regard to Archer's contingent fee reimbursement claim, summary judgment in favor of ALPA was proper because ALPA did not owe Archer a legal duty.

The judgment of the district court is AFFIRMED.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 76-2520

Cecil L. Archer,
Plaintiff-Appellant,
vs.
Airline Pilots Association International,
Defendant-Appellee.

[Filed Jan. 4, 1980]

ORDER

Before: TRASK and HUG, Circuit Judges, and
WONG,* District Judge

Judges Trask and Hug have voted to deny the petition for rehearing. Judge Trask recommends rejection of the petition for rehearing en banc. Judge Hug has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable Dick Yin Wong, United States District Judge, for the District of Hawaii, sitting by designation. Judge Wong died on December 26, 1978. Judge Wong heard oral argument and voted in accordance with the judgment in this case, but did not approve the Opinion of the court nor vote as to the Petition for Rehearing.

Appendix C

Letter of Agreement
between
Braniff Airways, Incorporated
and
The Air Line Pilots
in the service of
Braniff Airways, Incorporated
as represented by
The Air Line Pilots Association, International

The parties hereby mutually agree to supplement the current Basic Group Insurance Plan as follows:

A. Notwithstanding the contrary provisions (if any) in the Labor Protective Provisions arising out of the Panagra Acquisition Case, Docket 16764, et al, or otherwise applicable provisions of the Agreement between Pan American Grace Airways, Incorporated, and the Air Line Pilots Association, International, dated July 22, 1966, effective April 1, 1969, all pilots on the Braniff Airways, Incorporated, System Seniority List will be entitled to group insurance coverage only under the Braniff Group Insurance Plan in effect at the time of the Braniff-Panagra merger, except as supplemented herein.

B. Effective April 1, 1969, the Company will contribute 100% of the premium for the current basic (not optional) life insurance coverage, up to a maximum of ten thousand dollars ($10,000) coverage for each pilot on the active payroll of the Company and enrolled in such Basic Group

Insurance Plan on that date or who thereafter enrolls in the Plan.

C. Effective April 1, 1969, the Company will agree to extend the amount of pilot optional life insurance coverage up to the current State of Texas maximum (twice annual earnings to $50,000 overall maximum), the entire cost of such optional insurance to continue to be borne by the pilot.

D. That effective April 1, 1969, the Company will make available to pilots an additional Supplementary Group Insurance Accident and Sickness Insurance Plan, which, when combined with the current group insurance plan in effect on March 31, 1969, will provide the following total benefits:

I.

An appropriate increase in the daily room and board allowance which, when added to the daily room and board provision of the current Plan will provide a maximum benefit of eighty percent (80%) of the actual daily rate for a semi-private room and board charge, for a period of thirty-one (31) days, thereafter subject to the major medical coverage.

II.

The Surgical Fee Schedule contained in the Plan in effect on March 31, 1969, shall be supplementary which, when added to the provisions of the current Plan will provide a maximum benefit equal to the Relative Value Surgical Schedule attached hereto as Attachment A and incorporated herein by reference, with a maximum benefit of $900.

III.

An "in hospital doctor call benefit" of a maximum of five dollars ($5.00) per day times the number of days of actual hospital confinement, to a maximum of thirty-one (31) days, thereafter subject to major medical coverage.

IV.

A "maternity benefit" according to the following schedule for dependents of insured pilots, whose pregnancies commence after April 1, 1969, and during the period the pilot is actually enrolled in the Plan:

(a) $180—Normal Delivery

(b) 360—Caesarean Section

(c) 90—Miscarriage

(d) Major Medical not applicable for normal pregnancies

V.

The co-insurance feature under the Major Medical coverage of the Plan in effect on March 31, 1969, will be supplemented so as to increase the total benefit from such Plan and the supplement from 75%-25% to 80%-20% with no change in the deductible schedule.

VI.

That the combined benefits provided in the Plan in effect on March 31, 1969, as amended and supplemented herein shall include Attachment B coordination of benefits rider, incorporated herein by reference except that such rider shall extend only to group insurance coverage which was procured while in an employer-employee relationship.

VII.

A standard individual Connecticut General converted Hospital-Surgical Plan, including options, will be made available to terminating (not retiring) pilots who have been insured under the group basic and supplementary plan for a continuous period of three (3) months immediately preceding termination. The cost of such plan to be borne by the former employee.

VIII.

A pilot who retires from the service of the Company and is drawing benefits under the Braniff Pilots Retirement Plan may elect to continue enrollment in the group plan and supplements as outlined herein for himself and eligible dependent family members until he or such dependents becomes eligible for Medicare. The cost of such post-retirement insurance to be borne by the retired pilot.

E.

I.

The cost of the increased and supplementary benefits provided in Paragraph D above shall be borne by the pilot in accordance with the following monthly premium schedule:

(1) Pilot Only—$2.90

(2) Pilot and One Dependent—$8.80

(3) Pilot and Two or More Dependents—$11.00

II.

Effective August 1, 1969, the above premium schedule shall be as follows:

(1) Pilot Only—$1.93

(2) Pilot and One Dependent—$5.87

(3) Pilot and Two or More Dependents—$7.34

III.

Effective August 1, 1970, the Company will assume 100% of the pilots cost as set out in E II above.

F. Effective April 1, 1969, Braniff will make available to the pilots a prefunded Retirement Life Insurance Supplement at group rates as follows:

(1) The participation will be strictly optional with the pilot.

(2) The amount elected is also optional but may not exceed the total amount of basic life and optional life in force.

(3) To be eligible the pilots must maintain enrollment for the entire amount of Optional Additional life insurance for which he is eligible.

(4) Each participating pilot shall pay the entire cost of such Pre-Funded Retirement Insurance.

G. Effective April 1, 1969, the Company will make available to all pilots a Long-Term Disability Plan, including the following basic provisions:

(1) Six months waiting period.

(2) 50% of salary not to exceed $1,500 per month.

(3) Payments to discontinue at normal retirement date.

(4) After one (1) year, disability family benefits at rate of 2/3 of the employee benefit for a maximum of twenty-four (24) months.

(5) Supplemental pension premium which insures against loss of normal pension benefits.

(6) Enrollment shall be entirely voluntary.

(7) Cost of such plan shall be borne entirely by those participating and will be based on the number of pilot participants.

(8) Disability benefits to be integrated with benefits to which the participant is entitled under state, Disability Plan, Federal Social Security Act, Workmen's Compensation laws, and any other benefits under a program contributed to by the Company.

IN WITNESS WHEREOF, the parties have signed this Letter of Agreement this 13th day of March, 1969.

FOR THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

/s/ Charles H. Ruby

Charles H. Ruby
President

WITNESS:

Richard F. Witt

D. W. Walker

Frank Stone

Peter Landsman

Bernard J. Diedrich

Robert D. Marshall

Robert H. Drew

FOR BRANIFF AIRWAYS, INCORPORATED:

/s/ Don B. Hays

Don B. Hays
Staff Vice President—
Labor Relations

/s/ Herman Rumsey

Herman Rumsey
Staff Vice President—Flying

WITNESS:

M. G. Safrit

Thomas S. Smith

Amos Moses, Jr.

Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1511

CECIL ARCHER,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL B. EDELMAN
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IN THE

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OCTOBER TERM, 1979

No. 79-1511

CECIL ARCHER,

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v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Air Line Pilots Association International through undersigned counsel respectfully prays that the Petition for a Writ of Certiorari be denied.

QUESTION PRESENTED

Whether a union's duty of fair representation should be expanded beyond matters within its exclusive agency so as to require pursuit of individual benefit claims addressed, not to the employer, but to third party insurance carriers which administer employee benefit plans.

STATEMENT OF THE CASE

Before this Court are Petitioner Cecil L. Archer, formerly an airline pilot with Braniff Airways, and

Respondent Air Line Pilots Association, International (hereinafter "ALPA"), the exclusive bargaining representative of Braniff pilots. At issue is whether ALPA's duty of fair representation obliged it to sue in pursuit of Archer's claim for insurance benefits against a carrier with whom Braniff contracted to provide employee insurance specified in its collective bargaining agreement with ALPA.

After becoming disabled in 1969, Archer was required to retire from employment with Braniff. He made an application for life and disability insurance benefits under an employee benefit plan established by Braniff in compliance with the Braniff-ALPA collective bargaining agreement. Braniff's carrier, Connecticut General, denied Archer's application in major part in March 1970. While the collective bargaining agreement allowed employees aggrieved by action of Braniff to file a grievance within 60 days, Archer did not file a grievance.[1] He did, however, bring the matter to the attention of the ALPA Master Executive Council for Braniff employees which referred the matter to the ALPA Legal Department in July 1970 for investigation (C.T. 122-124). After investigation, ALPA on July 30, 1971 furnished Archer with a memorandum stating its conclusions that the complaint could not be remedied under the grievance procedure because no employer violation was apparent; that the matter could be resolved only through litigation; and that—while Archer was free to bring suit himself—conduct of such litigation on his behalf by ALPA would violate ALPA's policy of conducting only litigation of general membership concern. (C.T. 202-205; a copy of the memorandum and ALPA's transmittal letter of July 30, 1971 are included as an Appendix to this Opposition). After pressing the matter for several additional months with ALPA (C.T. 127-133, 207-210), Archer retained private counsel in May 1972 and sued Braniff and Connecticut General for the disputed benefits. The matter was settled in April 1975 incident to which Archer was required to pay a 40% contingent fee of $30,913.45. Archer then brought suit against ALPA claiming his counsel fees as damages and asserting that ALPA's duty of fair representation obliged it to pursue his insurance claim whether through the contract grievance procedure or litigation.

ALPA accepts the statement of the procedural history of the litigation as set forth in the Petition (pp. 3-5) but does dispute the unsupported and misleading assertions in the statement of facts thereafter (pp. 5-9). First, since it is beyond dispute that Archer initiated no grievance against Braniff within 60 days after denial of his insurance claim his assertion that ALPA somehow thwarted exercise of the grievance process is plainly insupportable. Second, the collective bargaining agreement recognizes only grievances complaining of actions of the *employer*; neither the Petition nor Archer's comments

[1] The contract grievance procedure (C.T. 165) provides for initiation of grievances by the aggrieved pilot or pilots within 60 days of learning of the action complained of:

> Any *pilot, or group of pilots,* in the service of the Company who have a grievance concerning *any action of the Company affecting* them shall be entitled to the same right of investigation, hearing and appeal as is established in Section 36 hereof for the investigation and hearing of cases of discipline and dismissal.
>
> Such grievance shall specify the provision or the provisions of the contract which the Company is alleged to have violated and shall state the date and the place when such alleged violation supposedly occurred. Except for cases involving the disciplining or dismissal of an employee, to be effective *the grievance must be filed within sixty (60) days after the pilot, or group of pilots, reasonably would have knowledge of the action complained of.* The parties may mutually agree to extend such sixty (60) day limitation where the circumstances warrant. The written request for investigation and hearing as provided in Section 36, Paragraph A-3, of this Agreement shall be addressed to the Vice President Flight Operations, with a copy thereof to the pilot's immediate supervisor. (Emphasis added.)

on the ALPA memorandum (C.T. 207-209) dispute ALPA's conclusion that "there are no indications that Braniff has failed to comply with its obligations to make available long-term disability insurance coverage to pilots." (C.T. 204). Thus, there can be no serious dispute with ALPA's conclusion that Archer's complaint was at any rate not remediable through the grievance procedure.[2] Finally, Archer's references to "hollow promises from ALPA" (Petition, p. 8) and ALPA's assertedly "inept, inadequate, and perfunctory handling of his insurance grievances" (Petition, p. 7, n. 3), are without record support. While Archer is distraught that ALPA did not pursue his insurance claim to his satisfaction, he can point to nothing in the record showing that ALPA promised to do other than it did. ALPA's advice that Archer could individually pursue his claim through litigation was correct, was in line with ALPA's consistent policy, and came in ample time to allow him to sue without jeopardy of a limitations bar.

Since there is no serious issue but that Archer failed timely to invoke the contract grievance procedure and that his insurance complaint could not have been successfully remedied through that procedure at any rate,[3] the sole issue presented by this Petition is whether ALPA was obliged by its duty of fair representation to pursue Archer's insurance claim through litigation. Only if it was so obliged could it be held liable for Archer's fees in pursuit of that litigation. As set forth below, the Ninth Circuit's holding that ALPA "had no duty to

---

[2] Indeed, ALPA's conclusion in this regard is substantially buttressed by the recent decision in *WJLA, Inc.* v. *Broadcast Employees*, 103 LRRM 2952 (D.D.C. February 12, 1980), holding that a claim for insurance against a carrier was not arbitrable under a collective bargaining agreement parallelling that here.

[3] Surely ALPA's duty of fair representation could not be violated by failure to pursue through the grievance procedure a complaint which was not arbitrable thereunder.

fairly represent Archer's grievance against Connecticut General" (Petition, A-9) is thoroughly consistent with the decisions of this Court and other Courts of Appeals. The Petition should accordingly be denied.

ARGUMENT

1. In upholding the District Court's rejection of Archer's duty of fair representation claim, the Court of Appeals correctly observed that the duty applies only to matters within the union's exclusive agency which did not include pursuit of Archer's insurance complaint against Connecticut General:

> "ALPA was not statutorily empowered to provide redress for Archer's grievance against Connecticut General. Nor did the ALPA-Braniff collective bargaining agreement provide that ALPA would be the employees' exclusive bargaining agent with Connecticut General. The bargaining agreement required Braniff to obtain insurance for its employees, but it neither set up procedures for making insurance claims nor made ALPA the exclusive vehicle for pursuing grievances. . . It is clear that ALPA had no duty to fairly represent Archer's grievance against Connecticut General.

Archer contends however, that 'assuming *arguendo* that ALPA owed no legal duty of fair representation to Archer vis-a-vis his insurance claims, it nonetheless, became subject to this fiduciary duty once it made representations, upon which appellant relied, that it would investigate his claim.' This estoppel argument is without merit. Even if Archer did rely upon ALPA to process his grievance, his reliance was unreasonable. Having served as one of ALPA's representatives during negotiation of the collective bargaining agreement with Braniff, Archer knew or should have known that he had no right to expect ALPA to handle his case in a particular man-

ner until he had filed a grievance in accordance with section 37 of the contract." (Petition, A-8-A-9)

The Ninth Circuit's understanding of the fair representation duty as extending only to matters within the union's exclusive agency is thoroughly consistent with the decisions of this Court—including the three cited by Petitioner. Petitioner quotes selectively in an effort to blur the boundaries of the duty. Thus, he quotes from this Court's decision in *International Bhd. of Electrical Workers* v. *Foust*, —— U.S. ——, 99 S.Ct. 2121, 2125 (1979) that the union "must represent fairly the interests of all bargaining-unit members during the negotiation, *administration* and *enforcement* of collective bargaining agreements" (emphasis added by Petitioner) (Petition, p. 9). He neglects to refer to the preceding sentence which makes clear that the duty applies to those negotiation, administration and enforcement functions *which are within the union's exclusive agency*: "when Congress *empowered unions to bargain exclusively* for all employees in a particular bargaining unit, . . . it imposed on unions a correlative duty . . . *to exercise that authority fairly.*" *Foust, supra, id.* (emphasis added). Similar qualification of the duty is reflected in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). *Hines* recognizes that the duty's scope is keyed to that of the union's exclusive authority by characterizing the bargaining agent's "responsibility" as "equal in scope to its authority. . . ." *Hines, supra,* 424 U.S. at 564.[4] Con-

[4] The Court proceeded to explain that claims for breach of the duty "may arise during the life of a contract when individual employees claim . . . improper treatment *at the hands of the employer.* Contractual remedies, at least in their final stages *controlled by union and employer,* are normally provided; *yet the union may refuse to utilize them or, if it does, assertedly may do so discriminatorily or in bad faith.*" *Hines, supra, id.* (emphasis added). Nothing in *Hines* suggests the duty would be breached by union failure to sue on a benefit claim against a carrier or other employee benefit plan. Maintenance of such a suit—unlike resort to the final stages of a contract grievance procedure for grievances against the employer—is not an exclusive prerogative of the union.

trary to Petitioner's intimation, *Conley* v. *Gibson*, 355 U.S. 41 (1957), does not support the proposition that once a benefit is negotiated, the bargaining agent is obliged to enforce it through suing on benefit claims against third party insurance carriers and employee benefit plans. *Conley* involved allegations by black plaintiffs that the union discriminatorily failed to pursue *against the employer* discharge grievances of black employees.[5] As the Court explained in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), but for the fair representation duty, the union's exclusive agency would create "unlimited discretion to deprive injured employees of all remedies for breach of contract", *Vaca, supra,* 386 U.S. at 186. Here, Archer's remedy against Braniff's carrier was in no way even qualified by ALPA's authority as bargaining agent.

The Ninth Circuit correctly held the fair representation duty to extend only to matters within the union's exclusive agency. It further correctly held that pursuit of individual benefit claims against a third party insurance carrier is not a matter within the union's exclusive agency. Petitioner's failure to cite a single case contrary to this holding is unsurprising inasmuch as litigation to enforce employee benefit claims payable by third parties to the bargaining agreement has routinely been

[5] Here, unlike *Conley*, there is no claim of discrimination in the provision of representation. ALPA has made a policy—as indicated in the appended memorandum—of pursuing litigation on behalf of individual members only where general membership interests are concerned. Archer accordingly can point to no instance in which ALPA has maintained suit on an individual benefit claim or reimbursed an employee for fees expended by him in such a suit. That it refused to do so even on behalf of Archer—a person long active in union affairs with whom persons in ALPA leadership were personally friendly (C.T. 172-174)—confirms the evenhanded application of ALPA's litigation policy. Thus, this case would fail to present a violation of the fair representation duty even were the duty extended as Archer requests.

maintained by individual claimants.[6] Notably, it has been held under the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*, that a union lacks standing to assert such claims, *Utility Workers Union* v. *Consumers Power Co.*, 453 F.Supp. 447, 450 (E.D. Mich. 1978).

Nor is the Ninth Circuit's holding in conflict with that of the Third Circuit in *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (C.A. 3, 1977), *cert. denied*, 434 U.S. 1013, the only case said to present a circuit conflict. As is apparent from Petitioner's recitation, *Nedd* did not hold a union obliged to sue to enforce benefit claims payable by third parties to the bargaining agreement. Rather, the claim in *Nedd* was that the union breached a duty of fair representation assertedly owed to retired pensioners through its alleged responsibility for the failure of the pension plan trustees to take sufficient steps to collect contributions owed by signatory employers under the collective bargaining agreement. The question of a union's duty to enforce obligations of third parties to the

[6] The duty of fair representation has been held inapplicable to denial of benefits by employee benefit plans regardless of their creation through collective bargaining, *Miniard* v. *Lewis*, 387 F.2d 864, 865 (C.A.D.C. 1967), *cert. denied*, 393 U.S. 873; see *Williams* v. *United Mine Workers of America*, 316 F.2d 475 (C.A. 4, 1963). This Court noted in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), that "the union's role in the administration" of a collectively-bargained benefit plan "is of a far different order from its duties as collective-bargaining agent" 404 U.S. at 170 and—citing *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201 (1962)—observed that the individual beneficiary would have a remedy for breach of contract were his benefits unilaterally changed or denied, 404 U.S. at 181, n. 20. In line with the Court's observation, suits for denial of benefits have been maintained routinely by the individuals aggrieved rather than by the unions which contracted for creation of the employee benefit plans; see for example, *Miniard, supra; Gaydosh* v. *Lewis*, 410 F.2d 262 (C.A.D.C. 1969); *Roark* v. *Lewis*, 401 F.2d 425 (C.A.D.C. 1968); *Connell* v. *U.S. Steel Corp.*, 516 F.2d 401 (C.A. 5, 1975); *Lee* v. *Nesbitt*, 453 F.2d 1309, 1311 (C.A. 9, 1972); *Lugo* v. *Employees Retirement Fund of the Illumination Products Industry*, 529 F.2d 251 (C.A. 2, 1976), *cert. denied*, 429 U.S. 826.

collective bargaining agreement under contracts ancillary thereto was in no way presented by *Nedd*. Contrary to Plaintiffs' assertion, the Third Circuit held only that the *Nedd* plaintiffs' claims were sufficient to support pendent jurisdiction and not that they made out a DFR claim, 556 F.2d at 200.[7]

2. Finally, to the extent employees should be allowed to recover fees expended in pursuant of individual benefit claims, Congress has addressed the matter explicitly in ERISA, 29 U.S.C. 1132(g), by authorizing fee awards on a discretionary basis in suits for employee plan benefits brought by plan participants and beneficiaries. Additionally, even prior to ERISA, fees were awardable in appropriate cases where benefits were withheld in bad faith, *Kiser* v. *Huge*, 517 F.2d 1237, 1256 (C.A.D.C. 1974); *Pete* v. *United Mine Workers of America Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1292 (C.A. D.C. 1975); *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). Thus, even in this pre-ERISA case, Archer could—if he wished—have pressed a fee claim against Connecticut General, which was after all the party which "forced [him] to hire a lawyer and go to court to get what was . . . owed him. . . ." *Vaughan, supra*, 369 U.S. at 531. Holding unions obliged to underwrite litigation of individual benefit claims would impose a legislative judgment which Congress has not made and which is in no way implicit in Congress' conferral upon unions of exclusive functions. Given the other avenues toward reimbursement of counsel fees in appropriate cases both under ERISA and otherwise, expansion of the fair representa-

[7] Even that holding of the *Nedd* Court would appear to conflict with this Court's declaration in *Pittsburgh Plate Glass Co., supra*, that since "retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." 404 U.S. at 181, n. 20.

tion duty beyond the traditional boundary—the union's exclusive agency—would be plainly inappropriate.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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GARY GREEN
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Counsel for Respondent

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Munsey Building, 1329 "E" Street, N.W.
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(202) 347-2211
Affiliated with A.F.L.-C.I.O.

July 30, 1971

Mr. Cecil Archer
Box 304
930 Kenilworth Road
Kenwood, California 95452

Dear Cecil:

I apologize for the length of time it has taken to procure the attached memorandum concerning your insurance claim. The memorandum is self-explanatory.

In conversation with Allen Berk, the staff attorney here in Washington, he suggested one of two avenues, either the Braniff grievance machinery or outside legal assistance through the civil courts.

With regard to your cashing of the check which you are holding in your safety deposit box, he has no advice in that matter other than to put forth the idea that if you plan to pursue it through one of the aforementioned procedural steps, it would be better not to cash the check. However, if you feel that this memorandum would serve as a final thought, then, of course, you would be able to cash the check because you are in effect stopping your pursuit.

If I can be of further service, please contact me.

My regards to Carol.

Sincerely,

John P. Giberson, Secretary

Enclosure

JPG:es

cc: F. W. Stone
R. Drew
A. Berk

AIR LINE PILOTS ASSOCIATION
INTERNATIONAL

TO—John Giberson

FROM—R. Drew & A. Berk—/s/ R.H.D.

ATTENTION

SUBJECT—Cecil Archer's Insurance Claim

DATE—July 12, 1971

PLACE—Home Office

REFERENCE

At your request, the Retirement and Insurance Department has investigated the Archer insurance claim problem, and submitted the file to the Legal Department for review and handling. Both departments are in agreement as to what ALPA's response here should be, and we have prepared this memo to review our analysis.

The facts which give rise to Mr. Archer's claim are not in dispute. The file shows that Braniff and ALPA entered into an Agreement on March 13, 1969, in which the Company agreed to provide various forms of insurance coverage. Among the benefits negotiated was a provision which stated:

> "Effective April 1, 1969, the Company will make available to all pilots a Long-Term Disability Plan . . . Enrollment shall be entirely voluntary [and] cost of such plan shall be borne entirely by those participating. . ."

Thereafter, Braniff did secure a certificate of insurance from Connecticut General Life Insurance Company certifying the issuance of various policies for the benefit of pilot-employees. The certificate states that covered pilots will, in fact, be entitled to monthly payments upon proof of a long-term disability.

However, the certificate also states that, in order to be covered by Long-Term Disability Insurance, the employee must have been in "continuous active service during the 30-day period prior to enrollment; otherwise, coverage does not begin until after he completes 30 days of continuous active service. Furthermore, the certificate provides that the insurance company will require "evidence of his insurability" and may require the pilot-employee to provide evidence such insurability (i.e., physician's examination) at his own expense. The pilot-employee is also required to make appropriate contributions and to complete an "appropriate payroll deduction order" in order to secure coverage.

The above-described conditions and limits upon Long-Term Disability coverage are not inconsistent with the Braniff-ALPA Agreements or with the similar coverage provided pilots on other airlines, pursuant to other Agreements.

The file contains copies of two enrollment cards bearing Captain Archer's signature. One is dated March 30, 1969; it is marked to indicate a request for coverage on other forms of optional insurance but a rejection of Long-Term Disability coverage. The second enrollment cards bears a date of June 12, 1969 and is marked to indicate a request for all optional forms of coverage including Long-Term Disability. Although confirming documents on this point are not in the file, Captain Archer asserts that the Company did actually deduct the contribution ($6.81) for Long-Term Disability coverage for the May 15-May 31 period as if his first enrollment card had elected such coverage and contribution. This deduction has, subsequently, apparently been returned to Captain Archer and is regarded by Braniff as a payroll error.

Connecticut General has never requested Captain Archer to provide evidence of his insurability or notified him that his condition was acceptable for coverage.

Captain Archer's last working day was April 19, 1969. On April 20, 1969, he went on medical leave; on April 28, 1969, he underwent surgery; and he retired, effective August 1, 1969. The file contains a doctor's report dated November 1969, which asserts that Captain Archer suffers from an arterial insufficiency and is permanently unable to return to work. This report was furnished in response to Connecticut General's inquiry after Captain Archer submitted a Disability claim.

Connecticut General has paid Captain Archer the maximum benefits under the policy for short term disability, but has refused to honor his claim for Long-Term Disability. According to Connecticut General, there are two reasons for rejecting the latter claim:

1. Captain Archer did not complete 30 days of service prior to his execution of the June 12, 1969 enrollment card requesting coverage since his last working day was April 19, 1969.
2. Captain Archer had a past history of illness and, therefore, would have been required to submit to a physical examination and probably been rejected for coverage even if he had made a timely application.

Captain Archer asserts that he inadvertently wrote an incorrect date on the enrollment card requesting long-term coverage, and that this card was actually executed and delivered prior to that date. In a recent letter to you, Captain Archer indicates that he now recalls submitting this "mis-dated" enrollment card on April 3, 1969.

In our view, Captain Archer's claim does not present an appropriate situation for ALPA participation. With re-

gard to potential grievance action against Braniff, there are no indications that Braniff has failed to comply with its obligations to make available long-term disability insurance coverage to pilots. The fact that the insurance benefits actually provided contained certain limitations and conditions which operate to Captain Archer's exclusion does not suggest that Braniff violated its Agreement, since these limitations and conditions are routine and standard aspects of such insurance.

With respect to a potential suit against Connecticut General, such activities are not typically within the Association's range of services provided for individual members. Compare the Executive Board resolution of May 1970, which amended ALPA policy to allow a staff attorney to represent the pilot in a contested claim involving an ALPA-sponsored Loss of License policy. Moreover, even if ALPA policy were less clear regarding the prohibition against ALPA litigation on other forms of insurance claims, the facts of this case would militate against ALPA participation.

Thus, a lawsuit on Captain Archer's behalf would raise no issues of general concern to ALPA members, but would necessarily be focused instead upon detailed factual questions only: for example, when Captain Archer actually executed his enrollment card and what was the nature of his prior medical history. Without commenting upon Captain Archer's chances of success in these issues if he should decide to pursue a lawsuit against Connecticut General, it is clear that the issues to be litigated are of significance only to him, and cannot be deemed to involve any general ALPA interests.